Avon Products, Inc. *and* United Steelworkers of America, AFL–CIO, Petitioner. Case 9–RC–12883

June 8, 1982

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On November 28, 1979, the Regional Director for Region 9 issued his Decision and Direction of Election, in which he found appropriate a unit consisting of certain classifications of production and maintenance employees. On December 4, 1979, the Regional Director issued an "Erratum" to his decision determining the voting eligibility of certain "reserve employees." Thereafter, the Employer filed a timely request for review of the Regional Director's decision, contending that his unit determination was erroneous. By telegraphic order dated January 2, 1980, the Board granted the Employer's request for review.

Pursuant to the Decision and Direction of Election, an election by secret ballot was conducted on January 3, 1980, under the Regional Director's supervision among the employees in the unit set forth in the Direction, with employees in disputed classifications being allowed to cast challenged ballots. At the conclusion of the election, all ballots were impounded pending the Board's Decision on Review.

On August 8, 1980, the Board issued its Decision on Review and Direction,[1] finding that approximately 292 employees had been erroneously excluded from the unit the Regional Director had found to be appropriate. Accordingly, the Board overruled the challenges to these ballots, sustained the challenges to the remainder, and directed the Regional Director to open and count the valid ballots and prepare and cause to be served on the parties a tally of ballots.

On August 18, 1980, the parties were furnished with a tally of ballots which showed that there were approximately 1,324 eligible voters and that 1,324 ballots were cast, of which 425 were for the Petitioner, 895 were against, and 4 were unresolved challenges. The challenged ballots were not sufficient in number to affect the results of the election. Thereafter, the Petitioner timely filed objections to the election.

Pursuant to Section 102.69 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Regional Director conducted an investigation and, on September 24, 1980, issued and duly served on the parties his Report on Objections, in which he recommended that the Petitioner's objections be overruled in their entirety and the results of the election certified. Thereafter, the Petitioner timely filed exceptions to the Regional Director's report and a supporting brief, and the Employer filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time production and maintenance employees employed at the Employer's Springdale, Ohio, operations including all employees employed in the representative service department, data processing department, shipping department, transportation department, merchandise control department, inventory, cost, and planning department, material handling department, processing department, packaging department, quality assurance department, production control department, engineering department, and "reserve employees"; but excluding all office clerical employees; the secretarial clerk, auditor/trainers, office supply clerk, and each sales clerk in the representative service department; the department secretary in the data processing department; the line balance analyst and department secretary in the shipping department; the department secretary in the transportation department; the department secretary in the merchandise control department; the inventory analyst, accountant, and department secretary in the inventory, cost, and planning department; the department secretary in the material handling department; the department secretary in the processing department; the department manager's secretary, department secretary, and administrative clerks

[1] 250 NLRB 1479.

in the packaging department; the department secretaries and chemists in the quality assurance department; the department analyst, stock distributer, scheduler, and department secretary in the production control department; the department secretary in the engineering department; all employees in the industrial engineering and purchasing departments; all tour hostesses not otherwise employed in positions included in the unit; and all guards, professional employees, and supervisors as defined in the Act.

The Board has considered the entire record in this proceeding, including the Petitioner's objections, the Regional Director's report, the Petitioner's exceptions and brief, and the Employer's brief, and hereby adopts the Regional Director's findings, conclusions, and recommendations only to the extent consistent herewith.

In its objections, the Petitioner contends that the election should be set aside because 292 employees whose names and addresses did not appear on the *Excelsior* list[2] cast valid ballots in the election due to the Board's Decision on Review, which expanded the size of the unit by that number.

The facts are not in dispute. The Employer timely filed a list of names and addresses of all employees in the unit the Regional Director found appropriate, thereby complying in full with the literal requirements of *Excelsior*. As noted earlier, the Employer also filed a request for review, which the Board granted on January 2, 1980.[3] The election was held the following day. Close to 300 employees, whom the Employer contended, and the Board later found, should have been included in the appropriate unit cast challenged ballots. Their names and addresses did not appear on the *Excelsior* list, and at no time did the Petitioner request that a supplemental list be furnished.

The Regional Director found that the failure of the Petitioner to have received timely a complete list of all voters ultimately found eligible, in these circumstances, did not warrant setting aside the election. The Regional Director noted that (1) the Petitioner participated in the ballot count on August 18 without objection; (2) the Employer submitted an *Excelsior* list meeting the requirements of the Decision and Direction of Election; (3) when the Board granted the Employer's request for review, it imposed no additional requirements on the Employer to furnish the names and addresses of the employees it contended should be included in the unit; (4) since the election was held the day after the request for review was granted, the Employer probably would not have been able to produce a list on such short notice, nor would the Petitioner have been able to use it if produced; and (5) at the representation hearing, the Petitioner took the position that it would not participate in an election held in a unit larger than that which it sought to represent, and which was found appropriate by the Regional Director. Accordingly, the Regional Director found that when the Board announced it would grant the Employer's request for review, the burden fell on the Petitioner to request a supplemental list of those employees who would be permitted to cast challenged ballots so that it could communicate with them if it chose to do so, and to request a postponement of the election. He reasoned that the Board's action in granting review put the Petitioner clearly on notice that the Board might find appropriate the broader unit urged by the Employer. The Petitioner's failure to take steps prior to the election to secure the disputed names or to have the election postponed, when combined with the Employer's full compliance with the requirements of the *Excelsior* rule, led the Regional Director to conclude that it would be improper to allow the Petitioner to rely on its own inaction as a ground for setting aside the election.[4]

The single issue to be considered is whether the Petitioner suffered prejudice in its election campaign because it received an *Excelsior* list which the Board's Decision on Review, by broadening the scope of the appropriate unit, rendered deficient. The principal rationale underlying *Excelsior* is that, by having timely access to the names and addresses of eligible voters, the union will be afforded an opportunity to inform all eligible employees of its position so that the employees will be able to vote intelligently. Therefore, in cases where the employer has omitted a substantial number of names from the *Excelsior* list, the Board has consistently set aside the election and directed that an-

[2] *Excelsior Underwear Inc.*, 156 NLRB 1236, 1239–40 (1966), requires that:

> . . . within 7 days after the Regional Director has approved a consent-election agreement entered into by the parties pursuant to Section 102.62 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, or after the Regional Director or the Board has directed an election pursuant to Sections 102.67, 102.69, or 102.85 thereof, the employer must file with the Regional Director an eligibility list containing the names and addresses of all eligible voters. The Regional Director, in turn, shall make this information available to all parties in the case. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

[3] All dates herein are in 1980, unless otherwise indicated.

[4] The Regional Director stated that his conclusion was buttressed by the fact that the Employer and the Petitioner, apparently anticipating that the Board might grant review, jointly requested on or about December 31, 1979, that the ballots be opened and counted immediately after the election rather than impounded as is customary in such situations. The request was denied.

other be conducted.[5] The record in the instant case shows that the Union did not have access to the names and addresses of 292 out of 1,324, or 22 percent, of those employees who actually cast valid votes in the election.

We do not agree with the Regional Director that the Petitioner bore the responsibility for not having received a complete list of eligible voters. We find that the Petitioner was under no obligation to seek the names and addresses of several hundred employees whose status as bargaining unit employees was in dispute and pending review at the time of the election. Despite the Board's grant of review, the Petitioner could not reasonably have been expected, especially with the election being run the next day, to assume that the unit the Regional Director found to be appropriate would be expanded on review and to govern its actions accordingly. In a situation such as this, the onus is not on either the Union to seek, or the Employer to compile, a list of all potential voters. Rather, the responsibility is the Board's to effectuate the policies expounded in *Excelsior* by staying the election until the unit has been determined.

The Employer argues that it delivered to the Regional Office precisely the list it was directed to provide under the Regional Director's Decision and Direction of Election and that it complied with *Excelsior* to the letter. The Employer also argues (1) that the election petition should have been dismissed based on the Petitioner's previously stated position that it would not participa te in an election if a unit larger than that which it sought to represent was found appropriate; (2) that the proviso at the end of Section 102.67(b) of the Board's Rules and Regulations implicitly sanctioned the conduct of the election with the *Excelsior* list received by the Union; (3) that the Board decided the issue here when it directed the ballots to be opened and counted; and (4) that the employees were in fact well informed about the election issues.

While we readily acknowledge that the failure of the Petitioner to receive a list containing the names and addresses of the 292 employees who cast challenged ballots, and who were included in the unit, was not due to any shortcoming on the Employer's part, but was caused instead by our own procedural oversight, we can conclude only that the Petitioner was prejudiced thereby. Since the Board's *Excelsior* policy was designed to enhance the availability of information and arguments to employees so that they might render a more informed judgment at the ballot box, it follows that the degree of prejudice to these channels of communication, and not the degree of employer fault, must ultimately determine, in any given case, whether the Board's *Excelsior* policy has been undermined. In *The Coca-Cola Company Foods Division*,[6] for example, the employer timely filed the required *Excelsior* list, but the Regional Office misaddressed the envelope when it forwarded it to the union. The union informed the Regional Office that it had not received the list and was not furnished with a copy until 3 days before the election. Despite the employer's full compliance with *Excelsior*, the Board concluded that the union's late receipt of the *Excelsior* list warranted setting the election aside. The Board also overturned an election in *American Laundry Machinery Division, a McGraw Edison Company*,[7] even though the employer had substantially complied with *Excelsior*. In that case, the Board found that delays by the U.S. Postal Service and Board error combined to cause receipt of the *Excelsior* list 8 days late, thereby prejudicing the union.

Accordingly, as the Petitioner was completely deprived of *Excelsior* information regarding nearly a quarter of those who cast valid ballots by our failure to stay the election pending the Decision on Review, we are compelled to find that the Petitioner has suffered substantial prejudice and that the election must be set aside.[8]

We agree with our dissenting colleague that the situation here was unfortunate—due largely to circumstances beyond the Board's control. We do not agree, however, that resolving it against the employees' right to be informed as contemplated in *Excelsior* is a proper resolution of the issue.

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[5] *EDM of Texas, Div. of Chromalloy American Corp.*, 245 NLRB 934 (1979) (16 out of 150 eligible voters, or 11 percent, omitted); *Chemical Technology, Inc.*, 214 NLRB 590 (1974) (10 out of 120 eligible voters, or 8 percent, omitted); *Sonfarrel, Inc.*, 188 NLRB 969 (1971) (5 out of approximately 46 eligible voters actually voting, or 11 percent, omitted); *Pacific Gamble Robinson Co./Omaha Branch d/b/a Gamble Robinson Co.*, 180 NLRB 532 (1970) (4 out of 36 eligible voters, or 11 percent, omitted).

[6] 202 NLRB 910 (1973).

[7] 234 NLRB 630 (1978).

[8] In so finding, we recognize that the election was conducted pursuant to Sec. 102.67(b) of the Board's Rules and Regulations, which requires the Regional Director to conduct an election directed by decision notwithstanding that a request for review has been filed with or granted by the Board. That section, however, also states that "[t]he filing of such a request shall not, *unless otherwise ordered by the Board*, operate as a stay of the election. . . ." (Emphasis supplied.) It therefore was contemplated that the 102 67(b) procedure might not be appropriate in all cases. Clearly it was not appropriate here. The disparity between the size of the unit in which the election was directed and the unit sought on review necessarily raised the *Excelsior* issue and should have led the Board under the circumstances to order a stay of the election until such time after review as one could appropriately be conducted in compliance with the *Excelsior* requirement. The Board's failure to do so does not now preclude rectification of this oversight. Indeed, the contrary conclusion would result in the elevation of form over substance.

ORDER

It is hereby ordered that the election of January 3, 1980, among the unit of employees hereinbefore set out, be, and it hereby is, set aside.

[Direction of Second Election[9] omitted from publication.]

CHAIRMAN VAN DE WATER, dissenting:

I am compelled to dissent from my colleagues' decision on two basic grounds. First I note the unfortunate delay in rendering decisions to the parties in this case. Secondly, I cannot agree with the majority's acknowledgment that it was their "procedural oversight" in ordering an election in an expanded unit which has resulted in prejudice to the Petitioner and warrants setting aside an election conducted over 2 years ago. For the reasons noted hereafter, a practical resolution of the problems posed would be to simply overrule the objections, certify the results, and insure that future decisions expressly offer to petitioners the option to postpone the election to permit receipt of an updated *Excelsior* list.[10]

Briefly, it is self-evident that timeliness in rendering our decisions is an important consideration in all types of cases pending before this Agency, particularly in the representation case area.[11] In some instances, timeliness may be more important than the ultimate decision on the merits. On August 18, 1980, the parties were furnished a tally of ballots which established that, of 1,324 votes cast, 425 were in favor of the Petitioner and 895 were against the Petitioner. The Petitioner filed timely objections shortly thereafter. Obviously a timelier decision would have better served the interests of the parties.

As to the merits, I find unfounded my colleagues' assertion that the Petitioner was prejudiced here as the facts clearly indicate to the contrary. The claim of prejudice is predicated on the fact that the Board, by *expanding the unit by 292 employees and permitting them* to vote a challenged ballot although such employees' names and addresses had not been submitted as part of the *Excelsior* list, made it impossible for the Union to contact such employees so that they could be part of an informed electorate. Inasmuch as the Union lost the vote by a difference of 470 votes, the 292 votes, even assuming *arguendo*, that they would have voted unanimously for the Union, *could not* have affected the results of the election. Thus, there was, in fact, no prejudice to the Petitioner.

The majority further argues, however, that it is important as a matter of principle, that there be full compliance with the *Excelsior* rule. I concur with the majority's view that an employer's failure to comply with the *Excelsior* rule warrants the imposition of what amounts to a *per se* rule setting aside such election when such objection is timely filed. Having such a rule will help insure that an employer will comply with the *Excelsior* rule or face the possibility of a rerun election. But the circumstances here do not warrant the imposition of such a *per se* rule nor do they warrant the majority's assumption that its "procedural oversight" resulted in prejudice to the Petitioner.

I concur in the Regional Director's dismissal of the Petitioner's objections, noting, as he did: (1) the Union took the position at the representation hearing that it *would not participate in an election in a unit larger than which it sought to represent; (2) after the Board issued its Decision on Review in which it ordered the 292 challenged ballots counted, the Union participated in the ballot count on August 18, 1980, without objection; (3) the Employer had submitted an Excelsior* list which met the requirements of the Decision and Direction of Election; and (4) the burden of seeking a postponement of the election rested with the Petitioner when the Board granted review and permitted the employees whose status was in issue to vote a challenged ballot. In effect, the Regional Director concluded, and I concur, that it was improper for the Petitioner to rely on its own inaction as a ground for setting aside the election. If there were any "procedural oversight," it was the Board's ordering the tally of the challenged ballots when the Union had earlier indicated that it did not wish to seek an election or representation of a unit other than what it sought.

In sum, I find no prejudice to the Petitioner and the majority's insistence on a rerun election does not constitute a proper utilization of the Board's resources. I think it more essential that in any decisions granting review where an election is being conducted in an expanded unit that the petitioner be explicitly informed in our decision of its option to: (a) seek a postponement of the scheduled election because of the expanded unit and have the right to an updated *Excelsior* list or (b) proceed to the election in the expanded unit waiving any *Excelsior* objections on the basis of the expanded unit or (c) withdraw from the election because it was not in the unit sought.

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[9] [*Excelsior* footnote omitted from publication.]

[10] *Excelsior Underwear Inc.*, 156 1236 (1966).

[11] I note, parenthetically, that the five-member Board was not at full strength for some months.